

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

Doc No. 29039

STATE OF SOUTH DAKOTA
ex rel.
PATRICK R. EALY
PETITIONER.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUN 25 2019

V.

Shirley A. Johnson-Lepel
Clerk

JOSH HAEDER, Treasurer
RICHARD SATTGAST, Auditor
JIM TERWILLIGER, Secretary of Revenue
of the State of South Dakota
RESPONDENTS.

PETITION FOR WRIT OF PROHIBITION

PETITIONER'S BRIEF

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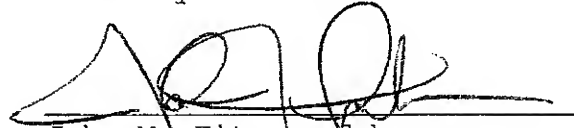
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ACKNOWLEDGEMENTS

The undersigned would like to acknowledge the research and contributions of Wenzel J. Cummings, Senior Legislative Attorney of the South Dakota Legislative Research Council.

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Attorney for Petitioner

A handwritten signature in black ink, appearing to read 'John M. Fitzgerald', is written over a horizontal line.

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TABLE OF AUTHORITIES

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I. PRELIMINARY STATEMENT

Throughout this brief, each citation will be followed by the appropriate page number(s).

II. JURISDICTION STATEMENT

Petitioner's Writ of Prohibition was timely filed by a South Dakota tax payer and is of original jurisdiction to the Supreme Court of the State of South Dakota under SDCL 21-30-2.

III. STATEMENT OF LEGAL ISSUES

Funds in the total of \$5,000,000.00 [five million dollars and zero cents] allocated to the Governor's Office of Economic Development Rural Broadband Fund for the specific purpose of expanding rural broadband were unconstitutionally allocated within the Annual General Appropriations Act, 2019-SB180 [SECTION 43].

IV. STATEMENT OF CASE AND FACTS

The Petitioner moves this Honorable Court for its order granting a temporary Writ of Prohibition pursuant to S.D. Const. Art. V, § 5; SDCL 15-25-1; SDCL 23-30-2 against the Respondents to prevent the disbursement of specific funds

allocated in the 2019 Supplemental Government Funding Bill for FY2020 for the following reason:

Funds in the total of \$5,000,000.00 [five million dollars and zero cents] allocated to the Governor's Office of Economic Development Rural Broadband Fund for the specific purpose of expanding rural broadband were unconstitutionally allocated within the Annual General Appropriations Act, 2019-SB180 [SECTION 43].

V. LEGAL ARGUMENT

Every year, the South Dakota Legislature must pass a budget appropriation for the upcoming year covering nothing more than the regular expenses of the State government for the upcoming fiscal year.

An appropriation is "a legislative body's... act of setting aside a sum of money for a specific purpose. If the sum is earmarked for a precise or limited purpose, it is sometimes called a specific appropriation [Blacks Law Dictionary]. The Supreme Court has established that a general appropriation bill is not legislation, but instead is considered to be "a setting apart of the funds necessary for the use and maintenance of the various departments of

the state government already in existence and functioning" as passed by a majority vote [State ex rel. Oster v. Jorgensen at 870, 872, (quoting Sellers v. Frohmler at 666)]. The Court has opined that the requirement of a two-thirds majority vote for special appropriations to be "a guard... against hasty and ill-advised outlays for extraordinary expenses." [Limitation of Taxation at 417, 419].

Article XII, § 2 of the South Dakota Constitution discusses five types of appropriations and how they may be made:

§ 2. *Contents of general appropriation bill--Separate appropriation bills. The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools. All other appropriations shall be made by separate bills, each embracing but one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.*

[S.D. Const. Art. XII, § 2]

1. Ordinary expenses of the executive, legislative and judicial departments of the state (general appropriation bill);

2. Current expenses of state institutions (general appropriation bill);
3. Interest on public debt (general appropriation bill);
4. Common schools (general appropriation bill); and
5. All other appropriations (separate bills embracing only one subject. State ex rel. Jensen v. Kelly at 319, 323.)

The first four types of appropriations mentioned in the Constitution are called general appropriations, while the fifth type is called a special appropriation. [Duxbury v. Harding at 740, 745.]

The Supreme Court first addressed the meaning of "ordinary" and "current" expenses in 1965 when asked to consider whether the Legislature was constitutionally authorized to include certain appropriations within the general appropriation bill. In its then decision, the Court established that past practice by the Legislature is not sufficient for it to claim constitutional authority. Even if previous appropriations similar to the ones at-issue had been included in a general appropriation bill, the Legislature does not have the constitutional authority to do

it again. "[P]recedent alone does not prove or disprove the existence of legislative power... If constitutional power does not exist it cannot be acquired by legislative assertion. If the power does not exist, it cannot be lost by failure to exercise it." [Oster at 870, 871.] The Court further clarified that "...[m]atters which could be included in the general appropriation bill may be the subjects of special appropriation bills without nullifying consequences. However, appropriations included within the general appropriation bill outside of and beyond its scope are void." [Id at 873. See also: S.D. Educ. Assn. v. Barnett at 386, 392.]

After considering the dictionary definitions of both "ordinary" and "current," and noting the similarity in the two terms' meanings, the Court would not "construe them to be synonymous" because "the framers of our constitution apparently intended some distinction between the 'ordinary expenses of the executive, legislative, and judicial department of the state' and the 'current expenses of state institutions[,] otherwise the word 'ordinary' or the word 'current' would have sufficed for both classes." [Oster at 875.]

The Court, upon consideration, held that:

The term 'ordinary expenses' must have a larger and broader connotation than the term 'current expenses'. Therefore, we construe the term 'ordinary expenses of the executive, legislative and judicial departments of the state' to mean any related expense which recurs with regularity and certainty. The term 'current expenses of state institutions' on the other hand is equivalent to 'running expenses' which includes any usual, regular, and continuing expenditure for the maintenance of property and for conducting the regular and authorized functions of the institution. Cost of land acquisitions, erection of permanent buildings and similar capital expenditures cannot be considered expenses. Extraordinary, emergent, and exceptional expenses for any purpose likewise fall within the category of 'All other appropriations'.

[Id.]

An appropriation that was approved previously as an "extraordinary expense" at its inception may become an "ordinary recurring expense of state government."

[Apa v. Butler at 68.]

On multiple occasions since the Supreme Court first addressed the meaning of general versus special appropriations under the Constitution, the Court has been asked to determine whether certain appropriations were legally included within the general appropriation bill:

Capital improvements/new construction for state colleges and universities fall outside the scope of "current

expenses of state institutions" [Oster at 460.]; capital improvements/new construction for state commissions fall outside the scope of "ordinary expenses of the state" [Id.]; transfer to highway secondary fund is contrary to Article XIII, section 9, requiring two-thirds majority vote for construction and maintenance of roads [Id.]; creation of property tax fund that would be funded through continuous appropriation in the general appropriation bill is not an "ordinary expense of state government" because it does not occur with "regularity" and "certainty" and it is not an expense that is necessary in order for the proper operation of the state government (and, in-fact, is not an expense of the state at all) [Duxbury at 746.]; appropriation for the DeSmet National Guard Armory for construction of armories and additions is not an "ordinary expense of state government" [Id.]; and a program to reimburse counties for presidential primary expenses is not an "ordinary expense of state government" not a "current expense of state institutions" because counties are not a branch of the state or a state institution [Id. at 747.].

The Court has confirmed the following as appropriate expenses under the general appropriations bill:

Appropriation for the state fair is an "ordinary expense of state government" because statutes requiring the fair and an appropriation of funds to provide for it date to 1903 [Apa at 68]; appropriation to the Department of Social Services for the purposes of the Domestic Abuse and Sexual Abuse Program is an "ordinary expense of state governemnt" because, although the program was created with a special appropriation, the program's longevity establishes it as an ordinary recurring expense [Id.]; appropriation to the Department of Agriculture to acquire and refurbish surplus motor vehicles and equipment is an "ordinary expense of state government" because the program being supported has been in place and ongoing since 1984 [Id.]; and appropriation to the Department of Health to make grants to improve emergency medical services is an "ordinary expense of state government" because, although the program being supported was created by special appropriation, the program's longevity and recurrence establish it as an ordinary expense [Id.].

Based upon this past precedent of appropriations reviewed by the Supreme Court, the following considerations can be supported:

- 1) The recipient must be within a branch of state government or a state institution (not including any county or (not yet challenged in case law) a municipality.)
- 2) The expense may not be for land acquisitions, the erection of permanent buildings, or for capital improvements.
- 3) The appropriation must recur with regularity and certainty for the state or be a usual, regular, and continuing expenditure for the maintenance of property and for conducting the regular and authorized functions of a state institution.
- 4) If the Constitution requires the revenue to be appropriated for a particular purpose, the general appropriation bill must provide that the funds are for that purpose.
- 5) The appropriation may not be for a purpose that requires a two-thirds vote under the Constitution.

VI. CONCLUSION

The Governor's Office of Economic Development Rural Broadband Fund is a new, non-recurring budgetary item and does not represent an "ordinary expense of state

government." Thusly, the item was inappropriately included in the FY2020 General Appropriations Bill (SB 180) and should have been brought up within the legislative session as a separate bill requiring a two-thirds vote of all members of each branch of the Legislature. Rather, as an inclusion within the General Appropriations Bill (SB 180), the allocation for Rural Broadband was approved under a simple majority within a bill limited in scope to encompass only the regular expenses of the state government - to which it is not. The door to the state treasury must not be so easily opened as to "all other appropriations."

Dated this 24th day of June 2019

MacNally Fitzgerald Law Firm
Attorney for Petitioner

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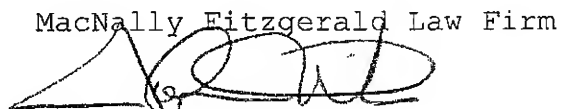
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RICHARD SATTGAST, Auditor,)	
JIM TERWILLIGER, Secretary)	
of Revenue of the State of)	
South Dakota)	
)	
Respondents.)	

The undersigned attorney hereby states that his Petitioner's Brief in Support of Writ of Prohibition submitted in the above-captioned matter complies with SDCL 15-26A-66 in that it does not exceed thirty-two (32) pages, nor does it exceed the type volume limitations. Specifically, Petitioner's Brief, to include Title Page, Table of Contents, Acknowledgements, Table of Authorities, Preliminary Statement, Jurisdictional Statement, Statement of Case and Facts, Legal Argument, Conclusion, Certificate of Compliance, Certificate of Service and Appendix contains 2376 (two thousand three hundred seventy-six) words.

Dated this 24th day of June 2019.

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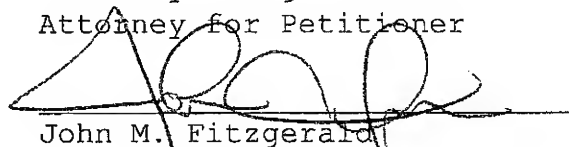
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of Revenue of the State of)	
South Dakota)	
)	
Respondents.)	

The undersigned attorney hereby certifies that on the undersigned date, he served a true and correct copy of PETITION FOR WRIT OF PROHIBITION upon the following:

Office of the Attorney General
CC: Jason Ravnsborg, Attorney General of South Dakota
1302 E Hwy 14; Suite 1
Pierre SD 57501-8501
ATGService@state.sd.us

Dated this 24th day of June 2019.

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APPENDIX

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AN ACT

ENTITLED, An Act to revise the General Appropriations Act for fiscal year 2019.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That section 2 of chapter 37 of the 2018 Session Laws be amended to read:

OFFICE OF THE GOVERNOR

(8) Building South Dakota - Local Infrastructure Improvement

Operating Expenses, Other Funds, delete "\$1,470,000" and insert "\$4,770,000"

(10) Building South Dakota - SD Housing Opportunity

Operating Expenses, Other Funds, delete "\$2,940,000" and insert "\$3,016,568"

Section 2. That section 3 of chapter 37 of the 2018 Session Laws be amended to read:

BUREAU OF FINANCE AND MANAGEMENT (BFM)

(5) Employee Compensation and Billing Pools

Personal Services, General Funds, delete "\$4,786,989" and insert "\$5,340,076"

Personal Services, Federal Funds, delete "\$2,498,371" and insert "\$2,696,978"

Personal Services, Other Funds, delete "\$5,602,902" and insert "\$5,929,784"

Operating Expenses, General Funds, delete "\$623,245" and insert "\$1,071,504"

Operating Expenses, Federal Funds, delete "\$338,345" and insert "\$722,167"

Operating Expenses, Other Funds, delete "\$542,269" and insert "\$2,010,668"

Section 3. That section 8 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF AGRICULTURE

(3) Agricultural Development and Promotion

Operating Expenses, General Funds, delete "\$469,390" and insert "\$569,390"

(4) Animal Industry Board

Operating Expenses, Other Funds, delete "\$3,487,106" and insert "\$6,836,819"

Section 4. That section 10 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF GAME, FISH AND PARKS

(5) State Parks and Recreation - Development and Improvement

Operating Expenses, Other Funds, delete "\$6,600,000" and insert "\$8,181,250"

Section 5. That section 11 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF TRIBAL RELATIONS

(1) Office of Tribal Relations

Operating Expenses, Other Funds, delete "\$20,000" and insert "\$40,000"

Section 6. That section 12 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF SOCIAL SERVICES

(2) Economic Assistance

Operating Expenses, General Funds, delete "\$17,631,603" and insert "\$17,661,960"

(3) Medical Services

Operating Expenses, General Funds, delete "\$230,543,367" and insert "\$209,466,824"

Operating Expenses, Federal Funds, delete "\$417,237,050" and insert "\$401,228,193"

(4) Children's Services

Operating Expenses, General Funds, delete "\$35,322,302" and insert "\$33,963,880"

Operating Expenses, Federal Funds, delete "\$38,705,073" and insert "\$46,215,547"

Operating Expenses, Other Funds, delete "\$3,063,314" and insert "\$3,065,238"

(5) Behavioral Health

Personal Services, General Funds, delete "\$33,087,854" and insert "\$32,587,854"

Personal Services, Federal Funds, delete "\$8,164,414" and insert "\$8,664,414"

Operating Expenses, General Funds, delete "\$51,496,862" and insert "\$50,715,963"

Operating Expenses, Federal Funds, delete "\$29,550,243" and insert "\$33,692,626"

Operating Expenses, Other Funds, delete "\$1,413,790" and insert "\$1,415,135"

Section 7. That section 13 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF HEALTH

(1) Administration, Secretary of Health

Operating Expenses, Federal Funds, delete "\$712,750" and insert "\$1,364,425"

(3) Family and Community Health

Personal Services, Federal Funds, delete "\$10,315,131" and insert "\$10,422,841"

Personal Services, Other Funds, delete "\$1,368,901" and insert "\$1,261,191"

(4) Laboratory Services

Personal Services, Federal Funds, delete "\$628,472" and insert "\$688,472"

Operating Expenses, Federal Funds, delete "\$2,715,348" and insert "\$3,315,348"

(5) Correctional Health

Operating Expenses, Other Funds, delete "\$17,190,617" and insert "\$17,194,610"

(15) Board of Pharmacy - Informational

Personal Services, Federal Funds, delete "\$0" and insert "\$75,000"

Operating Expenses, Federal Funds, delete "\$0" and insert "\$400,000"

Section 8. That section 14 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF LABOR AND REGULATION

(1) Administration, Secretary of Labor

Operating Expenses, Federal Funds, delete "\$7,778,249" and insert "\$8,625,249"

(2) Unemployment Insurance Service

Personal Services, Federal Funds, delete "\$4,178,467" and insert "\$4,096,175"

Operating Expenses, Federal Funds, delete "\$2,635,559" and insert "\$2,630,779"

F.T.E, delete "74.0" and insert "72.0"

(4) State Labor Law Administration

Personal Services, General Funds, delete "\$628,709" and insert "\$620,599"

Operating Expenses, General Funds, delete "\$97,528" and insert "\$105,638"

Section 9. That section 15 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF TRANSPORTATION

(1) General Operations

Operating Expenses, Federal Funds, delete "\$30,121,451" and insert "\$30,841,451"

Operating Expenses, Other Funds, delete "\$95,286,998" and insert "\$95,424,080"

Section 10. That section 16 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF EDUCATION

(1) Administration, Secretary of Education

Personal Services, Federal Funds, delete "\$962,841" and insert "\$1,037,385"

Operating Expenses, Federal Funds, delete "\$3,698,184" and insert "\$5,155,926"

F.T.E, delete "35.0" and insert "36.0"

(3) State Aid to General Education

Operating Expenses, General Funds, delete "\$467,381,046" and insert "\$460,471,381"

(5) Sparsity Payments

Operating Expenses, General Funds, delete "\$2,011,464" and insert "\$2,017,234"

(8) Postsecondary Vocational Education

Operating Expenses, General Funds, delete "\$23,380,382" and insert "\$23,461,887"

(11) Education Resources

Operating Expenses, General Funds, delete "\$7,646,672" and insert "\$8,005,414"

Section 11. That section 17 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF PUBLIC SAFETY

(1) Administration, Secretary of Public Safety

Operating Expenses, Other Funds, delete "\$129,750" and insert "\$159,750"

(2) Highway Patrol

Personal Services, Federal Funds, delete "\$1,584,954" and insert "\$2,064,954"

Operating Expenses, Other Funds, delete "\$7,419,972" and insert "\$7,672,448"

(3) Emergency Services & Homeland Security

Operating Expenses, Federal Funds, delete "\$8,014,755" and insert "\$7,984,755"

(4) Legal and Regulatory Services

Operating Expenses, General Funds, delete "\$1,323,980" and insert "\$1,327,886"

Section 12. That section 18 of chapter 37 of the 2018 Session Laws be amended to read:

BOARD OF REGENTS

(4) University of South Dakota

Operating Expenses, General Funds, delete "\$3,281,890" and insert "\$3,153,937"

(7) South Dakota State University

Operating Expenses, General Funds, delete "\$5,463,199" and insert "\$5,475,268"

(10) SD School of Mines and Technology

Operating Expenses, General Funds, delete "\$945,713" and insert "\$950,467"

(11) Northern State University

Operating Expenses, General Funds, delete "\$1,029,910" and insert "\$959,566"

(12) Black Hills State University

Operating Expenses, General Funds, delete "\$741,622" and insert "\$619,041"

(13) Dakota State University

Operating Expenses, General Funds, delete "\$570,667" and insert "\$588,190"

Operating Expenses, Other Funds, delete "\$11,972,223" and insert "\$14,132,223"

(14) SD School for the Deaf

Operating Expenses, General Funds, delete "\$1,012,893" and insert "\$1,008,882"

(15) SD School for the Blind and Visually Impaired

Operating Expenses, General Funds, delete "\$311,968" and insert "\$316,170"

Section 13. That section 19 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF THE MILITARY

(2) Army Guard

Operating Expenses, General Funds, delete "\$2,742,003" and insert "\$2,719,612"

Operating Expenses, Federal Funds, delete "\$12,684,957" and insert "\$12,614,162"

(3) Air Guard

Operating Expenses, General Funds, delete "\$234,687" and insert "\$249,353"

Operating Expenses, Federal Funds, delete "\$2,678,761" and insert "\$2,689,027"

Section 14. That section 20 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF VETERANS' AFFAIRS

(2) State Veterans' Home

Operating Expenses, Other Funds, delete "\$3,209,528" and insert "\$3,245,039"

Section 15. That section 21 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF CORRECTIONS

(2) Mike Durfee State Prison

Operating Expenses, General Funds, delete "\$6,516,007" and insert "\$6,618,876"

(3) State Penitentiary

Operating Expenses, General Funds, delete "\$6,648,422" and insert "\$6,605,384"

(4) Women's Prison

Operating Expenses, General Funds, delete "\$1,828,176" and insert "\$1,776,396"

(6) Inmate Services

Operating Expenses, General Funds, delete "\$29,352,607" and insert "\$29,357,945"

(8) Juvenile Community Corrections

Operating Expenses, General Funds, delete "\$10,280,349" and insert "\$9,980,584"

Operating Expenses, Federal Funds, delete "\$3,511,186" and insert "\$3,073,392"

Section 16. That section 22 of chapter 37 of the 2018 Session Laws be amended to read:

DEPARTMENT OF HUMAN SERVICES

(1) Administration, Secretary of Human Services

Operating Expenses, General Funds, delete "\$311,775" and insert "\$312,979"

(2) Developmental Disabilities

Operating Expenses, General Funds, delete "\$60,018,078" and insert "\$60,893,353"

Operating Expenses, Federal Funds, delete "\$82,990,339" and insert "\$84,242,985"

Operating Expenses, Other Funds, delete "\$5,591,583" and insert "\$5,625,714"

(3) South Dakota Developmental Center - Redfield

Personal Services, General Funds, delete "\$8,600,315" and insert "\$8,003,429"

Personal Services, Federal Funds, delete "\$11,162,885" and insert "\$10,391,709"

Operating Expenses, General Funds, delete "\$2,272,183" and insert "\$2,556,358"

Operating Expenses, Federal Funds, delete "\$2,756,091" and insert "\$3,123,248"

F.T.E, delete "352.6" and insert "346.6"

(4) Long Term Services and Supports

Operating Expenses, General Funds, delete "\$85,708,176" and insert "\$87,814,785"

Operating Expenses, Federal Funds, delete "\$106,338,255" and insert "\$113,324,881"

(5) Rehabilitation Services

Operating Expenses, General Funds, delete "\$3,967,352" and insert "\$3,990,239"

Operating Expenses, Federal Funds, delete "\$13,115,248" and insert "\$13,135,472"

Section 17. That section 26 of chapter 37 of the 2018 Session Laws be amended to read:

UNIFIED JUDICIAL SYSTEM

(2) Unified Judicial System

Personal Services, General Funds, delete "\$39,830,656" and insert "\$39,930,656"

Personal Services, Federal Funds, delete "\$403,731" and insert "\$303,731"

Operating Expenses, General Funds, delete "\$4,846,124" and insert "\$4,860,749"

Section 18. That section 27 of chapter 37 of the 2018 Session Laws be amended to read:

LEGISLATIVE BRANCH

(1) Legislative Operations

Single Line Item Appropriation, General Funds, delete "\$6,805,998" and insert "\$6,785,858"

Section 19. That section 28 of chapter 37 of the 2018 Session Laws be amended to read:

OFFICE OF THE ATTORNEY GENERAL

(1) Legal Services Program

Operating Expenses, Other Funds, delete "\$1,059,403" and insert "\$3,059,403"

(2) Criminal Investigation

Personal Services, Federal Funds, delete "\$1,136,812" and insert "\$1,381,913"

Operating Expenses, General Funds, delete "\$1,432,576" and insert "\$1,539,982"

Operating Expenses, Federal Funds, delete "\$2,052,759" and insert "\$4,250,706"

Operating Expenses, Other Funds, delete "\$2,902,668" and insert "\$3,686,118"

F.T.E, delete "100.5" and insert "102.5"

(3) Law Enforcement Training

Operating Expenses, Other Funds, delete "\$1,094,814" and insert "\$1,235,068"

Section 20. That section 30 of chapter 37 of the 2018 Session Laws be amended to read:

SECRETARY OF STATE

(1) Secretary of State

Operating Expenses, General Funds, delete "\$381,841" and insert "\$531,841"

Operating Expenses, Federal Funds, delete "\$1,212,019" and insert "\$4,465,419"

Section 21. Adjust all totals accordingly in sections 1 to 20, inclusive, of this Act.

Section 22. That section 34 of chapter 36 of the 2018 Session Laws be amended to read:

From the state highway fund:

Radio Communications Operations, delete "\$3,259,837" and insert "\$3,481,347"

From the game, fish and parks fund:

Radio Communications Operations, delete "\$359,817" and insert "\$74,161"

From the motor vehicle fund:

Radio Communications Operations, delete "\$572,221" and insert "\$614,355"

Adjust all totals accordingly.

Section 23. That section 42 of chapter 36 of the 2018 Session Laws be amended to read:

CORRECTIONS

Pardon and Paroles, Board of, delete "\$75" and insert "\$200"

Section 24. That chapter 36 of the 2018 Session Laws be amended by adding thereto NEW SECTIONS to read:

[Section 43.] The state treasurer shall transfer from the state general fund the sum of five million dollars to the rural broadband fund for the purpose of expanding rural broadband.

[Section 44.] The state treasurer shall transfer from the state general fund the sum of four million six hundred twenty thousand nine hundred twenty dollars to the radio communication fund for the purpose of upgrading emergency and communication infrastructure.

[Section 45.] The state treasurer shall transfer to the state general fund the sum of seven hundred

five thousand one hundred one dollars from the mountain pine beetle fund.

[Section 46.] The state treasurer shall transfer from the state general fund the sum of two hundred thousand dollars to the teen court grant program fund.

[Section 47.] The state treasurer shall transfer from the state general fund the sum of seven hundred thousand dollars to the legislative priority pilot program contingency fund.

Section 25. Funds appropriated by this Act which are unspent at the end of fiscal year 2019 may be carried over to fiscal year 2020.

Section 26. This Act is effective June 28, 2019.

An Act to revise the General Appropriations Act for fiscal year 2019.

I certify that the attached Act
originated in the

SENATE as Bill No. 180

Secretary of the Senate

President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 180

File No. _____

Chapter No. _____

Received at this Executive Office
this _____ day of _____,

20____ at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 20____

Governor

STATE OF SOUTH DAKOTA,

ss.

Office of the Secretary of State

Filed _____, 20____
at _____ o'clock ____ M.

Secretary of State

By _____
Asst. Secretary of State

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
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<http://atg.sd.gov/>

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. MCGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

June 7, 2019

Hon. Taffy Howard
State Representative
530 Westberry Drive
Rapid City, SD 57702

Re: Request for Official Opinion re: Constitutionality of Senate Bill 180's Budget
Transfer for Rural Broadband

Dear Representative Howard:

You, along with fourteen other legislators, have requested an official opinion from the Attorney General's Office determining whether a \$5 million budget transfer to the rural broadband fund, from the state general fund, violates Article XII, Section 2, of the South Dakota Constitution. For the reason indicated below, the Attorney General's Office respectfully declines to issue an official opinion regarding your request.

Senate Bill 180 was introduced during the 2019 legislative session to revise the fiscal year 2019 General Appropriations Act. Section 24 of the bill amends the fiscal year 2019 General Appropriations Act to require the transfer of \$5 million from the state general fund to the rural broadband fund for the stated purpose of "expanding rural broadband." Senate Bill 180 passed both chambers of the Legislature and was subsequently signed by Governor Noem on March 29, 2019. The provisions of Senate Bill 180 take effect on June 28, 2019. As you are aware, fiscal year 2019 closes on June 30, 2019.

Hon. Taffy Howard
June 7, 2019
Page 2

You, and your colleagues, allege that the above described transfer is a violation of Article XII, Section 2, of the South Dakota Constitution. Article XII, Section 2, requires the annual general appropriations bill “embrace nothing but... [the] ordinary expenses” of state government, and requires that “[a]ll other appropriations shall be made by separate bills[.]” You contend that the rural broadband fund transfer is not an ordinary expense of state government, and therefore should be carried out through a special appropriation bill. You have asked that the Attorney General’s Office stop the disbursement of general fund dollars to the rural broadband fund.

The Attorney General does not have the statutory authority to prevent any other state official from carrying out the transfer of funds required by Senate Bill 180. See SDCL ch. 1-11. A petition for a Writ of Prohibition is the proper legal process through which to challenge the rural broadband fund transfer.


A Writ of Prohibition is the judicial tool used to prohibit a government official from carrying out an action in excess of that official’s authority or jurisdiction. SDCL 21-30-1 and 21-30-2. “[A]ny taxpayer or elector may maintain a proceeding to restrain a public officer from the performance of an illegal act[.]” *Apa v. Butler*, 2001 S.D. 147, ¶ 6. (quoting *State v. Youngquist*, 11 N.W.2d 84, 85 (S.D. 1943)). “[T]he constitutionality of legislation affecting the use of public funds is a matter of public right.” *Apa*, ¶ 7 (quoting *Youngquist*, 11 N.W.2d at 85).

The filing of a petition for a Writ of Prohibition challenging the constitutionality of a legislative act, however, triggers the Attorney General’s duty to defend against that petition. “The Attorney General is the authorized legal advisor to the executive department” of state government. *In re Daugaard*, 2016 S.D. 27, ¶ 3. The Attorney General is statutorily required to appear on behalf of the State and defend in those legal proceedings in which the State is an interested party. SDCL 1-11-1. The Attorney General is also obligated to defend “the constitutionality of an act of the Legislature affecting the public interest[.]” SDCL 15-6-24(c).

Hon. Taffy Howard
June 7, 2019
Page 3

It would be inappropriate for the Attorney General to opine on the constitutionality of a legal matter the Attorney General's Office may obligated to defend in court. For this reason, your request for an official opinion concerning the constitutionality of the rural broadband fund transfer contained in Senate Bill 180 is respectfully declined.

Sincerely,



Steven R. Blair
Assistant Attorney General

STATE OF SOUTH DAKOTA)	IN THE SUPREME COURT
) SS.	OF THE
)	STATE OF SOUTH DAKOTA
STATE OF SOUTH DAKOTA)	DOCUMENT NO. _____
ex rel.)	
PATRICK R. EALY)	
)	
Petitioner,)	AFFIDAVIT OF PETITIONER
)	
V.)	
)	
JOSH HAEDER, Treasurer,)	
RICHARD SATTGAST, Auditor,)	
JIM TERWILLIGER, Secretary)	
of Revenue of the State of)	
South Dakota)	
)	
Respondents.)	

COMES NOW The Petitioner and affiant and after being first duly sworn, states and deposes as follows:

- 1) Affiant is the Petitioner in the above entitled case and a South Dakota tax payer.
- 2) Affiant has direct knowledge that the five million dollars allocated for rural broadband in SB 180 was not an appropriate expenditure under the State's general appropriation's bill.
- 3) The State of South Dakota's constitution prohibits the expenditure allocated for rural broadband in SB 180.
- 4) The State of South Dakota will suffer an immediate and irrevocable injury if a writ of prohibition is not issued by the Honorable Court as the five million dollars allocated for rural broadband will be issued by State Officials, including the Treasurer, Auditor and Secretary of Revenue on June 28, 2019.

5) There is no speedy and immediate means by which petitioner may proceed for relief other than through the Honorable Court.

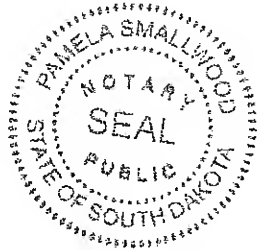
6) The Attorney General has refused to prosecute the action in the name of the State and the relief sought is a public matter and/or one of public right.

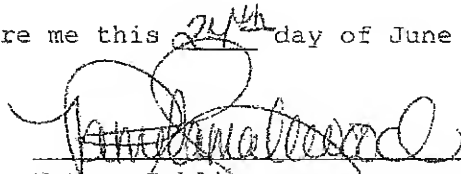
Dated this 24 day of June 2019.


Patrick R. Ealy, Petitioner

Subscribed and sworn to before me this 24th day of June 2019.

(SEAL)




Notary Public
My Commission expires: 4/4/2024

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

IN THE SUPREME COURT

OF THE

JUN 27 2019

STATE OF SOUTH DAKOTA

Shirley A. Johnson Lepp
Clerk

* * * *

PATRICK R. EALY, Taxpayer,
State of South Dakota,
Applicant,

vs.

JOSH HAEDER, Treasurer,
RICHARD SATTGAST, Auditor
and JIM TERWILLIGER, Secretary
of Revenue of the State of
South Dakota,
Respondents.

) ORDER DENYING APPLICATION FOR
) WRIT OF PROHIBITION

#29039

Applicant having served and filed an application for a writ
of prohibition along with supporting documents in the above-entitled
matter, and this Court having considered the application and other
documents during its conference on this date, and being fully advised
in the premises, now, therefore, it is

ORDERED that said application be and it is hereby denied.

DATED at Pierre, South Dakota, this 27th day of June, 2019.

BY THE COURT:

ATTEST:

[Signature]
Clerk of the Supreme Court
(SEAL)

[Signature]
David Gilbertson, Chief Justice

PARTICIPATING: Chief Justice David Gilbertson and Justices Janine M. Kern,
Steven R. Jensen, Mark E. Salter and Patricia J. DeVaney.